

1 THE HONORABLE ROBERT J. BRYAN
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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 WENDY A. MAKI,

11 Plaintiff,

12 vs.

13 BREMERTON SCHOOL DISTRICT, SUSAN K.
14 STONE, and her marital community

Defendants.

CASE NO.: 3:19-cv-05901-RJB

PLAINTIFF'S TRIAL BRIEF

15 **I. INTRODUCTION**

16 Until Defendants' wrongful acts, Plaintiff Wendy Maki was a special education teacher
17 at Kitsap Lake Elementary ("KLE") in the Bremerton School District. Mrs. Maki's claims against
18 BSD are retaliation in violation of the Washington Law Against Discrimination, negligence, and
19 ratification of Defendant Susan Stone's § 1983 violation. Mrs. Maki's § 1983 claim against then-
20 KLE Principal Susan Stone is for a state-created created danger.

21 When a teacher raises reasonable concerns about sexual grooming of her young
22 students, a school district may not retaliate against her. When a supervisor knows an individual
23 is violent and likely to attack and injure an employee, the supervisor must not order the
24 employee to work with that individual alone or unsupervised, especially when the employee
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repeatedly objects it is unsafe. BSD and Principal Stone violated these principles. The jury will find BSD and Principal Stone liable.

This trial brief outlines several issues that Mrs. Maki anticipates may arise during the case: (1) the importance of appropriately conforming the model instructions to fit this case's unique facts; (2) previewing why Ms. Stone violated a clearly established constitutional right; (3) requesting the Court allow Mrs. Maki to ask leading questions of certain adverse witnesses she is calling and bar Defendants from asking those witnesses leading questions; (4) issuing an adverse inference instruction for BSD allegedly deleting material security footage; and (5) taking judicial notice of Washington's retention requirements for public entities like BSD.

II. ANTICIPATED FACTS AT TRIAL

The following outline of the case is provided to aid the Court in anticipating the legal and evidentiary issues anticipated by Mrs. Maki during trial.

A. Wendy Maki joins Bremerton School District as a Special Education Teacher.

Before becoming a teacher, Mrs. Maki worked as a pastor and foster care parent, where she led a life of service focused on helping others – especially children and mothers. This calling led Mrs. Maki to become a schoolteacher, where she could focus on working with children with special needs. She went back to school. And she accepted a fulltime role as a teacher for severely cognitively disabled students at KLE.

B. Mrs. Maki Observes Paraeducator LaLanne Engaging in Repeated Boundary Violations that She Reasonably Believes May be Sexual Grooming.

When Mrs. Maki joined KLE in August 2016, other educators warned her that a pareducator assigned to her classroom was "touchy feely" and needed to be "watched." The school culture had long tolerated the misconduct of pareducator Tammy LaLanne despite her repeatedly violating policies requiring adults to maintain professional boundaries. Mrs. Maki and others observed LaLanne touching children in ways not permitted under school policy.

1 More than once, Mrs. Maki caught the paraeducator secretly lying down alone with
 2 students in a dark, enclosed closet, including one occasion where Ms. LaLanne was "rubbing"
 3 that student. Ms. LaLanne also encouraged a student's "self-stimulation" in a closet at school.
 4 Mrs. Maki noticed that certain male students assigned to LaLanne displayed over-sexualized
 5 behavior, including grabbing the paraeducator's nipples. On two other occasions, the
 6 paraeducator posted pictures of an apparently naked, sleeping child(ren) online:
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13 BSD trains its teachers to detect and report physical and emotional boundary violations
 14 because preventing boundary violations is one of the most effective ways to prevent teacher-
 15 student sexual misconduct. Based on her training, and her experience working as a pastor and
 16 foster parent, Mrs. Maki recognized LaLanne's boundary violations as indicators of sexual
 17 grooming. She knew that many boundary violations are well-intentioned. But that where
 18 educators don't enforce boundary rules, abusers may use the opportunity to cross the line from
 19 mentor to sexual misconduct. Mrs. Maki's training taught her that preventing abuse requires
 20 teachers to vigilantly report any concerns, because an educator may only have part of the
 21 picture. And while paraeducator LaLanne's conduct would be concerning when directed
 22 towards any student, Mrs. Maki knew she had to be hypervigilant because her severely
 23 cognitively disabled students epitomize vulnerability.
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1 **C. Principal Stone Mismanages Maki's Repeated Reports of Boundary Violations.**

2 Throughout 2016, Mrs. Maki repeatedly raised concerns about Ms. LaLanne's conduct
 3 to KLE Principal Susan Stone. But Ms. Stone mismanaged Mrs. Maki's reports. Rather than
 4 inform the District Administration about the troubling conduct, investigate the conduct, and
 5 ensure paraeducator LaLanne ceased her behavior; Defendant Stone failed to take any
 6 meaningful action. Instead, she sent this text to Mrs. Maki in or before October 2016 about
 7 paraeducator LaLanne "cozying" with a student in the "dark":
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9 Sadly I cannot get the image of
 10 a staff person cozying up to a
 11 student in a dark area out of my
 12 mind.
 13

14 Yuk!
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17 **D. After Mrs. Maki Escalates Concerns to the District Administration, BSD
 18 Reprimands LaLanne. Maki Informs the District of Stone's Mismanagement.**

19 In February 2017, Mrs. Maki again caught paraeducator LaLanne lying with a student in
 20 a dark closet. She took this concern directly to another BSD administration official, Kimberly
 21 Shipp. BSD investigated and issued LaLanne a reprimand for "repeated . . . physical boundary
 22 violations." During the investigation, District Administrators learned from Mrs. Maki that
 23 LaLanne's conduct was not new and that she had repeatedly requested Ms. Stone take action.
 24 District Administrators Garth Steedman and Denise Kennedy questioned Stone regarding her
 25 inadequate responses to Mrs. Maki's report.

26 BSD did not notify the children's parents. It never did.

27 **E. Ms. LaLanne's Conduct Continues – and Mrs. Maki Continues Reporting it.**

1 After LaLanne returned to Mrs. Maki's classroom, she continued to touch the children
 2 inappropriately. In April 2017, Mrs. Maki reported Ms. LaLanne for toileting a second-grade
 3 student, even though the student was fully capable of toileting himself. In May 2017, BSD
 4 suspended Ms. LaLanne for three days after she used an inappropriate restraint, noting her
 5 "conduct continues to be inappropriate." LaLanne ignored her suspension and waited outside
 6 the kindergarten playground to speak with a student. Mrs. Maki reported this conduct as well.
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8 BSD allowed paraeducator LaLanne to continue working with the students and Mrs.
 9 Maki, despite LaLanne's increasing defiance. BSD still told the parents nothing.

10 **F. Principal Stone's Ongoing Retaliation against Mrs. Maki.**

11 Upset by the District's increasing scrutiny and fearful for her job, Principal Stone began
 12 to retaliate against Mrs. Maki for her continued reporting on LaLanne. By way of illustration
 13 only, Ms. Stone began to withdraw her support and become increasingly standoffish.
 14 Defendant Stone also became openly hostile toward Mrs. Maki, allowed paraeducator LaLanne
 15 to blatantly retaliate against Mrs. Maki without consequence, and refused to provide her with
 16 the tools necessary to a safe classroom, including legally required 1:1 paraeducator support.
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18 **G. Despite the Obvious Risk, Principal Stone Orders Mrs. Maki to Isolate Alone in a
 Room with a Dangerous Student and then Abandons Her.**

19 Principal Stone's ongoing retaliation against Mrs. Maki culminated in September 2017.
 20 Starting September 26, 2017, and continuing for three days, she ordered Mrs. Maki to isolate
 21 herself alone in a room with a student who was uncontrollably and unpredictably violent. Mrs.
 22 Maki knew this was unsafe. Mrs. Maki begged Stone not to require this. She cited her fears of
 23 the student's outbursts and the need for a 1:1 paraeducator.
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25 Documents and witness testimony will show that Principal Stone ignored Mrs. Maki's
 26 pleas even though she knew that the student - called by the acronym "GC" to protect student
 27 privacy -- was uncontrollably violent towards educators. He had repeatedly injured other

1 teachers. For example, GC's former 1:1 paraeducator Bonnie Myers will testify that GC attacked
2 her and gave her a concussion in the Spring of 2017. Additionally, GC injured Mrs. Maki and
3 sent her to Urgent Care on September 6, 2017.

4 Days before ordering Mrs. Maki to isolate, Ms. Stone received written communications
5 advising her it was unsafe to barricade GC in a room. Despite knowing barricading him would
6 cause GC to escalate, Principal Stone placed a firehose device over the classroom door hinge,
7 locking it from the outside, while Mrs. Maki was alone with GC on September 26. Mrs. Maki
8 could not escape through the other exit, a door to a small kitchen, because that door was
9 locked for safety reasons. She begged Principal Stone to stop using the device while she was
10 in the room. But Principal Stone continued using it, even after she admitted to another
11 employee that it was "unsafe." Ms. Stone was required to supervise Mrs. Maki's safety, but video
12 footage shows her walking away from the room while Mrs. Maki and GC are inside. She
13 abandoned Mrs. Maki repeatedly throughout the day. And no one was there to help Mrs. Maki
14 when GC attacked her.

15 For the next two days, Mrs. Maki reiterated her well-founded concern that Stone's
16 directive to isolate alone with GC was unsafe. But although Principal Stone knew Mrs. Maki was
17 extremely upset, she ordered her to continue isolating alone in the room with GC. District
18 Administrator Linda Sullivan-Dudzic approved of the plan to isolate Mrs. Maki with GC despite
19 the ever-present danger. Witness testimony and documents show that when GC and Mrs. Maki
20 were isolated together, Principal Stone frequently left Mrs. Maki unsupervised.

21 GC injured Mrs. Maki, including sending her to Urgent Care on September 28, 2021.
22 But more traumatizing than the physical injuries, were the hours left alone, isolated,
23 abandoned, and ignored under constant threat of violence by the disabled student.

1 **H. BSD's Actions Caused Mrs. Maki Tremendous Suffering. She is Improving, but May**
 2 **be Permanently Harmed.**

3 BSD's actions caused Mrs. Maki to suffer from debilitating psychological injuries.
 4 Decades ago, she lost a child in a tragedy. But she overcame the pain of that loss and forged
 5 ahead, fueling her work to help children so that her daughter's memory would be a blessing.
 6 Principal Stone's callousness forced her to watch another young child, GC, suffer as he tried to
 7 escape. It was Principal Stone's job to keep students and teachers safe. Yet her principal
 8 abandoned her, isolated her, and retaliated against her when Mrs. Maki was trying to protect
 9 her students. Indeed, she placed Mrs. Maki in a situation where she would almost certainly be
 10 attacked and unable to defend herself.

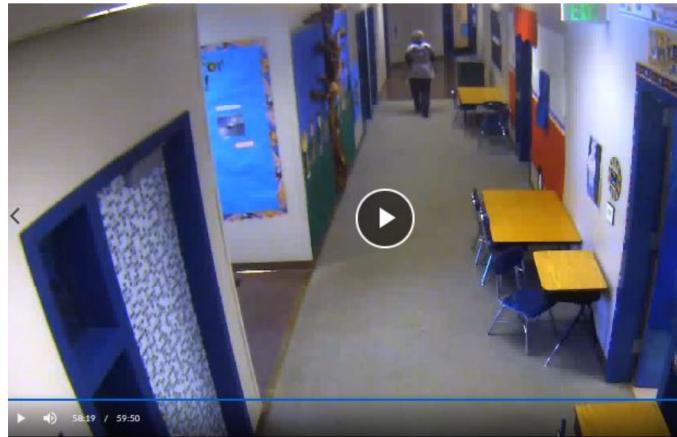
11 The mistreatment and violence Mrs. Maki endured triggered her underlying trauma,
 12 forcing her to leave teaching and the workforce until 2021, and causing debilitating PTSD,
 13 anxiety, and suicidal ideations. Treating psychologist Dr. Cheryl Hart, friend Davia Houston,
 14 daughter Hannah Maki, and husband Craig Maki, will testify regarding their own observations
 15 of Mrs. Maki's road to recovery and the harms and losses she has endured.

16 **I. Video Footage showing the Hallway Outside of Room 112 is Missing or Deleted.**

17 Principal Stone insists that she or another educator directed by her constantly
 18 supervised Mrs. Maki while she was alone in the room with GC over three days. Ms. Stone said
 19 she constantly supervised Ms. Maki through a sidelight window next to the door to room 112.
 20 If she did, a security camera outside Room 112 would have conclusively shown this. However,
 21 BSD Assistant Superintendent Garth Steedman preserved only 1 hour, 57 minutes, and 7
 22 seconds of footage from September 26, 2017. There is no other video footage. And witnesses
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1 will concede that even the footage that does exist is incomplete, omitting GC's escape from
 2 the room and return under adult restraint.

3 The evidence will show that BSD destroyed evidence favorable to Mrs. Maki's case even
 4 though it knew a safety incident had occurred. Indeed, even the limited footage that BSD did
 5 produce contradicts Principal Stone's claim that she never abandoned Mrs. Maki:¹



14 BSD failed to preserve or destroyed the footage from the afternoon of September 26th,
 15 and all the footage from September 27th and 28th, even though it had a duty preserve it. The
 16 state records retention policy, Mrs. Maki's September 2017 reports that Principal Stone
 17 isolated her in a room for three days, and the risk of a lawsuit from GC's parents for injuries and
 18 violations of his Individualized Education Program all show BSD failed its duty to preserve
 19 evidence. At the close of evidence, Mrs. Maki will ask this Court to include an adverse inference
 20 instruction.

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 27 ¹ The door and sidelight window for Room 112 are pictured in the bottom left corner. At trial, witnesses
 will identify the woman pictured walking away from Room 112 as Principal Stone.

III. LIABILITY ISSUES FOR TRIAL

A. Bremerton School District Unlawfully Retaliated Against Mrs. Maki

Mrs. Maki brings a retaliation claim against Bremerton School District under the Washington Law Against Discrimination, Chapter 49.60 RCW (the "WLAD"). The WLAD's anti-retaliation provision proscribes employers from retaliating against employees for opposing "any practice" forbidden by "this chapter":

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has **opposed any practices forbidden by this chapter**, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

RCW 49.60.210(1) (emphasis added).

The anti-retaliation provision “extends broad protections” to “any person” that (a) engages in statutorily protected conduct where (b) the protected conduct is a substantial factor in the employer’s “adverse employment action” against the employee. *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 742, 332 P.3d 1006 (2014); see *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 950-51, 946 P.2d 1242 (1997) (describing the “broad language of RCW 49.60.210, the Legislature’s mandate for liberal construction, and the strong public policy against discriminatory practices,” and holding a person can bring a claim against their credit union under RCW 49.60.210(1) because the WLAD is not limited to employment discrimination).

1. Mrs. Maki engaged in protected conduct when she opposed what she reasonably believed to be paraeducator LaLanne's sexual grooming of young students and when she raised concerns about Stone's failure to prevent it.

In Washington, a person engages in statutorily protected conduct when they oppose conduct that they reasonably believe constitutes “**any** practice[] forbidden by’ Chapter 49.60 RCW.” *Currier*, 182 Wn. App. at 742 (emphasis added); RCW 49.60.210(1) (outlawing

1 retaliation for opposing "any practice forbidden by this chapter"); see *Galbraith*, 88 Wn. App.
 2 at 950-51.

3 According to the Washington State Supreme Court, a school district violates
 4 Chapter 49.60 RCW where its agents engage in sexual misconduct towards students. *W.H. v.*
 5 *Olympia Sch. Dist.*, 195 Wn.2d 779, 782-83, 789, 465 P.3d 322 (2020) (holding that a school
 6 district bus driver's sexual misconduct towards students violates the WLAD's public
 7 accommodations sections). A single act of sexual misconduct towards a student may violate
 8 the WLAD, even if not severe or pervasive. See *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848,
 9 855, 860-61, 434 P.3d 39 (2019) (holding that when a place of public accommodation is
 10 accused of harassment, Washington courts do not use the higher "severe or pervasive"
 11 standard used in employment settings. Rather, in places of public accommodation [such as
 12 schools], conduct is discriminatory when a reasonable person who is a member of the
 13 protected class would feel the act was discriminatory. The conduct must consist of more than
 14 "rhetoric that is subjectively offensive"); *W.H. v. Olympia Sch. Dist.*, 195 Wn.2d at 782-83
 15 (holding that a school district violates the public accommodations sections of the WLAD when
 16 its agent engages in sexual misconduct towards students).

17 Under Washington regulations governing educator conduct, an educator commits
 18 "sexual misconduct" when they engage in "**sexual grooming**" of a student. WAC 181-88-
 19 060(1)(d); WAC 181-87-080(e). According to those regulations, sexual grooming includes
 20 behavior "such as befriending and/or establishing a connection with a student . . . to lower the
 21 student's inhibitions for the purpose of a sexual relationship." *Id.*; see also, e.g., *United States*
 22 *v. Hitt*, 473 F.3d 146, 152 (5th Cir. 2006) (detailing that "persons who sexually abuse children
 23 engage in a 'grooming process' designed to reduce resistance to sexual advances. This
 24 process, according to testimony, includes gift-giving, isolating the victim from his guardians,
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1 and activity designed to desensitize the victim to sexual advances, e.g., touching in an
 2 innocuous manner and thereafter escalating the sexual nature of the touches . . ."). Due to the
 3 seriousness of the conduct, Washington's mandatory reporting laws require educators to
 4 report sexual grooming to administrators.²

5 Here, Mrs. Maki will show that she engaged in statutorily protected conduct because
 6 she (i) opposed what she (ii) reasonably believed to be sexual grooming of the district's
 7 students.

8 **a. Mrs. Maki "opposed" Ms. LaLanne's sexual grooming by repeatedly reporting
 9 it to her supervisor and BSD.**

10 Mrs. Maki unquestionably opposed paraeducator LaLanne's conduct when she
 11 directed LaLanne to stop and reported it to her Principal Stone and BSD's administration. See,
 12 e.g., *Currier*, 182 Wn. App. at 746 (complaints about conduct constitute opposition).

13 **b. Wendy Maki "reasonably believed" paraeducator LaLanne was sexually
 14 grooming her young students.**

15 Mrs. Maki need only show that she was opposing what she reasonably believed to be
 16 discrimination. *Currier*, 182 Wn. App. at 739. She need not show that paraeducator LaLanne's
 17 conduct actually constituted sexual grooming. *Id.* To show reasonable belief, a plaintiff need
 18 only show that the alleged conduct was "arguably a violation of the law." *Id.*; *Estevez v. Faculty
 19 Club of Univ. of Washington*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005). This standard
 20 "makes due allowance" for the "limited knowledge" most plaintiffs possess about
 21 discrimination law. *Currier*, 182 Wn. App. at 746 (citation omitted). For example, in *Currier*, the
 22 plaintiff, who was an independent contractor, reasonably believed he was opposing
 23 discrimination when he reported another independent contractor's single race-based
 24 discrimination when he reported another independent contractor's single race-based

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 27 ² See RCW 28A.400.317 (educators must report sexual misconduct by another employee to the appropriate school administrator); RCW 28A.400.301 (districts required to report past sexual misconduct); WAC 180-88-060 (defining sexual misconduct to include sexual grooming).

1 offensive comment to the party that hired them—even though that conduct clearly did not
 2 violate the WLAD. See *id.* at 746 (“The trial court found that Currier reasonably believed that a
 3 white independent contractor telling a Latino independent contractor that “Mexicans are good
 4 at crossing borders” was a discriminatory practice . . .”).

5 As detailed in the Joint Statement of Disputed Jury Instructions and the authority cited
 6 in support, “[s]exual grooming is a preparatory process in which an adult gradually gains a
 7 child’s trust and lowers their inhibitions with the intent to eventually sexually abuse the child.
 8 The process is designed to desensitize the child to abuse and often begins with innocuous
 9 touches, boundary violations, or spending intimate time alone with the child. The groomer
 10 slowly escalates their conduct, with the goal of eventually progressing to blatant sexual acts.”
 11 Dkt. 139 (citations omitted).

12 Here, the evidence will show that Mrs. Maki reasonably believed that Ms. LaLanne could
 13 be grooming young students. *Supra*, Section II.B.

14 **2. Mrs. Maki’s opposition was a substantial factor in BSD’s adverse action**

15 In a retaliation case, an adverse employment action is any action that “well might have”
 16 or “would” have dissuaded a reasonable employee from making or supporting any charge of
 17 discrimination. *Boyd v. State, Dep’t of Soc. & Health Servs.*, 187 Wn. App. 1, 15, 349 P.3d 864,
 18 871 (2015). An adverse action can be a single action such as a demotion. *Id.*, 14. Or it can be a
 19 series of adverse actions that “taken together” had the potential to dissuade a reasonable
 20 person in Mrs. Maki’s position from opposing sexual grooming. *Id.*, 14, 15; see *Strother v.*
 21 *Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir.1996) (noting that being
 22 excluded from meetings, being denied telephone access, suffering some verbal and physical
 23 abuse at the hands of co-workers, being replaced as coordinator for personal physician
 24 program, being denied secretarial support, and being given a more burdensome work
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1 schedule would demonstrate an adverse action, if proven). "[C]ontext matters in analyzing the
 2 significance of any given act of retaliation because an act that would be immaterial in some
 3 situations is material in others." *Boyd*, 187 Wn. App. at 13.

4 Here, Mrs. Maki will show that her opposition to grooming was a substantial factor in
 5 BSD subjecting her to a series of adverse employment actions. This includes, without limitation,
 6 BSD (1) failing to protect her from known retaliation by the paraeducator LaLanne, (2) refusing
 7 to provide Mrs. Maki with 1:1 paraeducator support; (3) subjecting her to increased
 8 employment scrutiny; (4) excluding her from decision-making by ignoring Mrs. Maki's
 9 repeated pleas that it was unsafe to isolate her alone in a room with a student Principal Stone
 10 knew to be unpredictably and uncontrollably violent; and (5) abandoning Mrs. Maki with that
 11 student despite a clear rule requiring BSD to constantly monitor her safety. Whether "taken
 12 together" or independently, these actions and others described by witnesses and documents
 13 "well might have" dissuaded a reasonable person in Mrs. Maki's position from opposing
 14 LaLanne's conduct or speaking up against Defendant Stone's mismanagement.

16 **3. Mrs. Maki's proposed retaliation instructions clearly and accurately state the law
 17 that conforms to this case.**

18 Washington encourages appropriate modification of its pattern instructions. The
 19 Pattern Instructions provide a "neutral starting point—not an ending point—for the preparation
 20 of instructions that are individually tailored for a particular case." Washington Pattern Jury
 21 Instruction ("WPI") 0.10 (7th ed.) (July 2019) (emphasis added). "The goal, always, is to finish
 22 with a set of instructions that clearly and accurately state the law that applies to the particular
 23 case, no more and no less." *Id.*

24 Under Washington law, jury instructions must: (1) allow each party to argue their theory
 25 of the case; (2) not be misleading; and (3) when read as a whole, properly inform the jury on
 26 the applicable law. See *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).

1 Once these conditions are satisfied, a trial court enjoys broad discretion to tailor its instructions
 2 to fit a case's facts, including the number of instructions and their specific wording. See, e.g.,
 3 *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145 (2009).

4 **a. Mrs. Maki's instruction that a district cannot retaliate when a teacher
 5 opposes grooming of her young students is clear and accurate.**

6 Mrs. Maki's case involves a unique fact pattern. To ensure that the jury properly
 7 understands the issues and the law, she requests the Court instruct the jury that:

8 It is unlawful for a school district to retaliate against a teacher for opposing what the
 9 teacher reasonably believed to be sexual grooming of her young students.

10 Dkt. 139, pgs. 10-15 (citing authorities). This accurately states the law. *Supra*. Rather than
 11 describing opposition to "sexual harassment" or "sexual misconduct," Mrs. Maki appropriately
 12 proposes a subset of those terms that is specific to this case's facts: sexual grooming.

13 According to Defendants' objections, Mrs. Maki's proposed instruction is a
 14 "misstatement of the law" because Plaintiff's proposed instruction "omits" that the alleged
 15 discriminatory act must be "based on sex" or "gender." See Dkt. 139, pg. 10, 13, 15. Defendants
 16 apparently suggest that the below revised instruction would be proper.

17 It is unlawful for a school district to retaliate against a teacher for opposing what the
 18 teacher reasonably believed to be discrimination against her young students based on
 19 sex.

20 This objection is not well-reasoned. Sexual misconduct directed toward students in public
 21 schools *is discrimination based on sex*. See *W.H. v. Olympia Sch. Dist.*, 195 Wn.2d at 792-93
 22 (discussing that "sexual harassment" and "sexual misconduct" are forms of "sex
 23 discrimination"). Therefore, opposing sexual misconduct toward students *is* opposing
 24 discrimination based on sex. Sexual grooming is one form of sexual misconduct. It follows that
 25 a school district who retaliates against a teacher for opposing what she reasonably believes is
 26 sexual grooming violates the WLAD. See *supra*.

1 Lawyers enjoy logic puzzles like this. But jurors are not accustomed to thinking of sexual
 2 grooming as a form of sex discrimination. The Court can and should substitute the term "sexual
 3 grooming" for "sexual misconduct" or "discrimination based on sex." Plaintiff's proposed
 4 instruction is a simple, clear, and accurate statement of the law, which conforms to the facts of
 5 this case and allows the Court to provide jurors with plain instruction so that they may answer
 6 the question of retaliation raised by this case. See WPI 0.10 (7th ed.) (July 2019) ("jury
 7 instructions need to express legal concepts in plain language for lay jurors").

8 Defendants' objection also may suggest that the instruction should specify that Mrs.
 9 Maki must have been opposing grooming aimed at only one sex or gender. See Dkt. 139, pg.
 10 10, 13, 15. But there is no support for this proposition under Washington law. And in *Bostock*
 11 *v. Clayton County*, the United States Supreme Court rejected the theory that excuses sex-based
 12 discrimination if it targets both male and females. See *Bostock v. Clayton Cty., Georgia*, 140 S.
 13 Ct. 1731, 1741 (2020) (it is not "a defense for an employer to say it discriminates against both
 14 men and women because of sex"); see *Oliver v. Pac. Nw. Bell Tel. Co., Inc.*, 106 Wn.2d 675,
 15 678, 724 P.2d 1003 (1986) (where consistent with WLAD's liberal interpretation, Washington
 16 courts look to federal decisions interpreting Title VII as persuasive authority).

17 **b. Mrs. Maki's proposed instruction defining adverse action is appropriate.**

18 Plaintiff proposes instructing the jury that an adverse employment action is one that
 19 "well might have" dissuaded an employee from opposing grooming. Dkt. 139, pg. 19. Plaintiff's
 20 current proposed instruction states:

21 The term "adverse" means unfavorable or disadvantageous. An employment action is
 22 adverse if it is harmful to the point that it well might have dissuaded a reasonable
 23 teacher from opposing sexual grooming of their young students. Whether a particular
 24 action is adverse is judged from the perspective of a reasonable person in Wendy
 25 Maki's position.

1 *Id.* Defendants object to "well might have" as a "misstatement of the law" under *Boyd*, 187 Wn.
 2 App. 1. Defendants are mistaken. *Boyd* expressly indicates that an action is adverse when it
 3 either "well might have" or "would" discourage opposition. *Boyd*, 187 Wn. App. at 15.

4 Defendants may intend to use the model instruction's use of "would" to argue that an
 5 adverse action must necessarily dissuade a reasonable employee. See Dkt. 139, pg. 16
 6 (arguing that, under the model language, Mrs. Maki needs to show that the adverse action
 7 "will" dissuade a reasonable employee). But the law does not require that level of certainty. See
 8 *Boyd*, 187 Wn. App. at 13, 15. Any action or actions that "well might have" discouraged
 9 opposing sexual grooming is an unlawful adverse action. Using "well might have" in the jury
 10 instruction is accurate, informative, and allows both parties to argue their case.

12 Mrs. Maki also intends to update the proposed adverse action instruction to add a
 13 sentence instructing the jury that a series of actions "taken together" can be materially adverse:

14 An adverse employment action can be a single action or it can be several actions that
 15 taken together well might have dissuaded a reasonable teacher from opposing sexual
 16 grooming. Whether a particular action or series of actions taken together are adverse
 is judged from the perspective of a reasonable person in Wendy Maki's position.

17 See *Boyd*, 187 Wn. App. at 15 ("taken in, context, a reasonable jury could find that these
 18 actions, taken together . . . would have dissuaded a reasonable worker from making a
 19 discrimination charge."). Because Mrs. Maki alleges Ms. Stone engaged in a host of retaliatory
 20 acts, this instruction is appropriate. See *supra*.

21 **4. BSD Negligently Failed to Provide a Reasonably Safe Workplace.**

23 To prove BSD was negligent, Mrs. Maki needs to show duty, breach, causation, and
 24 damage. *E.g.*, *Schooley v. Pinch's Deli Mkt., Inc.*, 80 Wn. App. 862, 866, 912 P.2d 1044 (1996).
 25 BSD has a duty to provide a reasonably safe workplace. *E.g.*, *Greenleaf v. Puget Sound Bridge*
 26 & *Dredging Co.*, 58 Wn.2d 647, 650, 364 P.2d 796 (1961). Here, BSD breached that duty in
 27 numerous ways, including by (1) ordering Mrs. Maki to isolate alone in a room with a known

1 violent student; (2) placing a firehose over the hallway exit door; (3) failing to provide 1:1
 2 paraeducator support; and (4) leaving Mrs. Maki unsupervised while alone with GC despite a
 3 rule requiring BSD to monitor her safety.

4 **5. Defendant Stone Violated Mrs. Maki's Section 1983 Rights.**

5 To prove her Section 1983 claim, Mrs. Maki needs to prove (1) Ms. Stone committed an
 6 affirmative act; (2) the act placed Mrs. Maki in a position of actual, particularized danger by
 7 exposing Mrs. Maki to a danger she would not have otherwise faced; (3) that Ms. Stone acted
 8 with deliberate indifference to a known or obvious danger; and (4) the affirmative act that
 9 created the danger caused injury that was foreseeable. See *Kennedy v. City of Ridgefield*, 439
 10 F.3d 1055, 1062-64 (9th Cir. 2006); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th
 11 Cir. 2018). The Ninth Circuit has issued several decisions that show why Mrs. Maki will establish
 12 these elements and why Ms. Stone cannot maintain the qualified immunity defense discussed
 13 in Section V.

14 In *Grubbs I*, the Ninth Circuit sustained a workplace state-created danger claim where
 15 supervisors directed a female employee to work "alone" and unsupervised with an individual
 16 they knew would likely attack women if given the opportunity. *L.W. v. Grubbs*, 974 F.2d 119,
 17 121-22 (9th Cir. 1992). There, the inmate raped a registered nurse at the prison. *Id.*, 120.
 18 Defendants had assigned the nurse to work with the inmate even though they knew that (1) the
 19 inmate had a history of violence against women and was likely to assault a woman, (2) the nurse
 20 was likely to be alone with the inmate during her rounds, and (3) the nurse would not be
 21 prepared to defend against or take steps to avert an attack. *Id.*, 121. The Court reasoned that
 22 these allegations supported Section 1983 liability because the supervisor's acts independently
 23 created the opportunity for and facilitated the inmate's assault on her. *Id.*, 122.

24 Under *Pauluk*, the Ninth Circuit sustained a workplace state-created danger claim
 25 where supervisors directed an employee to work at a site over his "clear[]" safety-based
 26 objections, even though they knew the worksite's unsafe condition had harmed another
 27 employee in the past. *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). There, an
 employee requested not to be transferred to a particular location due to his concerns about

1 mold, but the supervisors transferred him "involuntarily." *Id.* The court held that the facts
 2 supported a section 1983 claim because when they ordered the transfer, the supervisors knew
 3 the worksite had a long history of mold exposure that had harmed another employee. *Id.*, 836
 4 F.3d at 1119. Although not directly expressed in the Court's reasoning, a clear theme is that
 5 the supervisor also knew that employee was not able to adequately defend himself from the
 6 mold spores. See generally *id.*

7 In *Kennedy*, the Ninth Circuit sustained a state-created danger claim where the
 8 defendant failed to keep his clear promise to sporadically supervise the plaintiff's safety in the
 9 face of a known and immediate risk. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1057 (9th
 10 Cir. 2006). There, the "police officer knew the neighbors' son had a history of aggravated
 11 violence, including previously breaking into a house to attack someone." *Id.* 1057-58, 1064. He
 12 also knew the plaintiffs feared swift retaliation once the boy learned they had accused him of a
 13 crime, which is exactly why the officer promised to provide additional patrols *that night* after
 14 notifying the boy. *Id.*, 1058. The officer, however, did not provide the additional patrols and
 15 the boy broke into the home and shot the plaintiffs. *Id.* The Court reasoned that the officer
 16 acted with deliberate indifference because, among other things, he "reassured" the "visibly
 17 frightened" plaintiffs of increased security that was "never provided or plainly ineffective" and
 18 had detailed knowledge of the threat presented by the boy. *Id.*, 1065; see also *Patel v. Kent*
 19 *Sch. Dist.*, 648 F.3d 965, 975 (9th Cir. 2011) (applying and analyzing the officer's promise of
 20 safety in *Kennedy*).

21 In contrast, in *Patel*, the Ninth Circuit rejected a state-created danger claim where,
 22 although the defendant schoolteacher broke a clear promise to constantly supervise the
 23 student's safety, he did not know there was an immediate danger. *Patel*, 648 F.3d at 975-76.
 24 There, the district promised to constantly supervise the student because the school knew of
 25 the general danger other students might manipulate her, "especially [at] bathroom time." *Id.* at
 26 968-70. But when a teacher let the student take "quick" unsupervised trips to the bathroom,
 27 he did not know of the specific, immediate danger: that another student was having sex with
 the disabled student in the bathroom. *Id.* at 970. The Court held that although it was important

1 the teacher "made a promise she allegedly failed to keep-supervising [the student] at all
 2 times," the teacher's actions did not constitute deliberate indifference because he had not
 3 known of the "immediate danger in allowing [the student] to briefly use the next-door
 4 bathroom alone." *Id.* at 975-76 (emphasis in original).

5 **a. Ms. Stone committed affirmative acts.**

6 In analyzing whether Ms. Stone committed an affirmative act, courts examine whether
 7 her acts left Mrs. Maki "in a situation that was more dangerous than the one in which [she] found
 8 [Mrs. Maki]." Here, the evidence will show that Ms. Stone committed several affirmative acts,
 9 including ordering Mrs. Maki to isolate alone with GC, placing the firehose over the door,
 10 including after Mrs. Maki objected, and leaving Mrs. Maki unsupervised while alone with GC
 11 despite promising to monitor the room. See, e.g., *Pauluk*, 836 F.3d 1117, 1124 (directing
 12 plaintiff to work at specific job site over employee's objection constituted affirmative act).

14 **b. The acts placed Mrs. Maki in particularized danger**

15 Here, Ms. Stone's acts placed Mrs. Maki in particularized danger: she ordered Mrs. Maki
 16 to isolate alone and in close proximity with a student that she knew had repeatedly attacked
 17 educators, including in the previous days. See, e.g., *Hernandez*, 897 F.3d at 1133 (directing
 18 plaintiffs towards a crowd of known violent protestors created actual, particularized danger).

20 **c. Ms. Stone acted with deliberate indifference**

21 Deliberate indifference is the required mental state. *Hernandez v. City of San Jose*, 897
 22 F.3d 1125, 1135 (9th Cir. 2018). A defendant acts with deliberate indifference where they
 23 "recognized an unreasonable risk and actually intended to expose" the plaintiff to such risks
 24 "without regard to the consequences to" the plaintiff. *Id.* Here, Mrs. Maki will show that Ms.
 25 Stone acted with deliberate indifference when, over Mrs. Maki's objections that it was unsafe,
 26 Ms. Stone ordered her to isolate alone in a room with a student that Ms. Stone knew to be
 27

1 unpredictably and uncontrollably violent. Then, Ms. Stone abandoned Mrs. Maki despite
 2 promising to constantly monitor her safety. See, e.g., *Grubbs I*, 974 F.2d at 121-22; *Pauluk*, 836
 3 F.3d at 1125; *Kennedy*, 439 F.3d at 1057. Ms. Stone knew that GC had repeatedly attacked
 4 teachers over the prior months, and that his behavior was escalating right before the attack.
 5 She also had been warned not to confine GC.

6 **d. Mrs. Maki's injury was foreseeable.**

7 Here, the injury to Mrs. Maki was foreseeable because, among other things, Ms. Stone
 8 knew that GC had repeatedly injured other teachers, Mrs. Maki had warned that isolating alone
 9 with GC was unsafe, that Mrs. Maki was extremely upset because of the isolation, and Ms. Stone
 10 knew an educator should never be alone with GC.

12 **6. Mrs. Maki's proposed instruction regarding deliberate indifference is clear and
 13 accurate.**

14 The Ninth Circuit's Pattern Instructions are intended to "give the jurors, in
 15 understandable language, information to make the trial more meaningful . . ." Manual of
 16 Model Jury Instructions for the Ninth Circuit, 2017 Edition (March 2021), Introductory
 17 comment. Judges are given "substantial latitude in tailoring the instructions" if the instructions
 18 do not mislead, accurately state the law, and fairly and adequately cover the issues presented.
 19 See *Lewy v. S. Pac. Transp. Co.*, 799 F.2d 1281, 1287 (9th Cir. 1986). Here, Mrs. Maki proposes
 20 modifying the deliberate indifference instruction to make it more understandable to the
 21 layperson.

22 In the Ninth Circuit the defendant acts with deliberate indifference if she:

24 recognized an unreasonable risk and actually intended to expose the [the
 25 plaintiff] to such risks without regard to the consequences to [the plaintiff].
 26 **In other words**, the [defendant] must have known that something was going to
 27 happen but ignored the risk and exposed [the plaintiff] to it anyway.

1 Hernandez, 897 F.3d at 1135 (internal citations, quotations, and brackets omitted) (emphasis
 2 added).

3 A lawyer trained in legalese and interpreting case law can parse that these two
 4 statements express the same standard. But juries are not trained lawyers. They are engineers,
 5 teachers, and blue-collar workers. Instructing them that Ms. Stone "must have known that
 6 something was going to happen" risks confusion. The jury may be misled into believing that
 7 Ms. Stone had to have conclusively known that GC would attack Mrs. Maki. But that is not the
 8 law. For example, in *Kennedy*, the police officer knew that the son had a history of aggravated
 9 violence, including breaking in, and that the plaintiffs were afraid the boy would attack them
 10 after he learned they had accused him of a crime. *Supra*. It was not a certainty that the boy
 11 would attack the plaintiffs or break in. *Supra*. To avoid confusing the jury with legalese, Mrs.
 12 Maki proposes modifying the Pattern Instruction to include *Hernandez*'s straightforward
 13 definition:

14 In this context, "deliberate indifference" means that Susan Stone disregarded a known
 15 or obvious consequence of their actions. ~~In other words, Susan Stone must have
 16 known that something was going to happen but ignored the risk and still exposed
 17 Wendy Maki to that risk. Susan Stone must have recognized an unreasonable risk
 18 and intended to expose Wendy Maki to such risk without regard to the consequences
 19 to her.~~

20 Dkt. 139, pg. 27 (showing modifications). This language is a simple, clear, and accurate
 21 statement of the law. The Court should revise the instruction.

22 **7. Linda Sullivan-Dudzic ratified Susan Stone's constitutional violation.**

23 "If [a final policy maker] approve[s] a subordinate's decision and the basis for it, their
 24 ratification would be chargeable to the municipality because their decision is final. *City of St.*
 25 *Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Ratification occurs when the official policymaker
 26 involved has adopted and expressly approved of the acts of others who caused the
 27 constitutional violation. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996). There must be

1 evidence that the policymaker "made a deliberate choice to endorse" the subordinate
 2 employee's actions. *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). "A single decision
 3 by a municipal policymaker can be sufficient, even though the decision is not intended to
 4 govern future situations. *Lytle v. Carl*, 382 F.3d 978, 987-88 (9th Cir. 2004)

5 Here, BSD has stipulated that Ms. Sullivan-Dudzic was a final policymaker for BSD.
 6 Ms. Sullivan-Dudzic was aware of the significant danger that GC presented to educators. And
 7 she knew that Mrs. Maki was extremely upset about being placed in the room with GC. Despite
 8 this, she expressly ratified the plan to isolate Mrs. Maki alone in a room with GC and place the
 9 firehose over the exterior door. At that time, she knew that using the firehose was "unsafe."

11 **IV. DAMAGES ISSUE FOR TRIAL**

12 **A. Mrs. Maki will Present Evidence of Economic Losses and Emotional Damages 13 Proximately Caused by Defendants' Conduct**

14 Mrs. Maki will seek compensatory damages, including damages for lost wages, lost
 15 benefits, physical harm, and psychological injuries. Due to her trauma, Mrs. Maki was unable
 16 to work between October 2017 and March 2021. Although she returned this spring to a Clinical
 17 Practice program teaching special education at Pleasant Valley Middle School, it was an unpaid
 18 position. And while she intends to return to paid work in the near future, it is uncertain whether
 19 she will be able to. And even if she does, it will be more likely than not at a reduced rate from
 20 what she would have made but for BSD's wrongful actions.

22 Mrs. Maki is also entitled to non-economic compensatory damages. Mrs. Maki has
 23 developed debilitating mental distress, anxiety, PTSD, and has suffered from suicidal
 24 ideations. BSD's actions left Mrs. Maki debilitated and traumatized for years. Those damages
 25 are still ongoing.

1 **B Mrs. Maki is Entitled to Punitive Damages against Defendant Stone**

2 For § 1983 claims, “[i]t is well-established that a ‘jury may award punitive damages . . .
 3 either when a defendant’s conduct was driven by evil motive or intent, or when it involved a
 4 reckless or callous indifference to the constitutional rights of others.” *Morgan v. Woessner*,
 5 997 F.2d 1244, 1255 (9th Cir. 1993). Further, “malicious, wanton, or oppressive acts or
 6 omissions are also “proper predicates for punitive damages under § 1983.” 422 F.3d 800, 807
 7 (9th Cir. 2005). Here, because Defendant Stone recklessly and callously ordered Mrs. Maki to
 8 isolate alone with a known violent student and violated clear safety rules by abandoning her
 9 alone with the student, Mrs. Maki will establish reckless indifference supporting punitive
 10 damages.

12 **V. AFFIRMATIVE DEFENSES**

13 **A. The Qualified Immunity Defense Does Not Apply**

14 Ms. Stone seeks qualified immunity against Mrs. Maki’s Section 1983 claims. The Ninth
 15 Circuit’s recent decision in *Hernandez* clearly establishes the defense does not apply. The
 16 Court set forth the test for qualified immunity:
 17

18 Qualified immunity protects government officers from liability for civil damages insofar
 19 as their conduct does not violate clearly established statutory or constitutional rights of
 20 which a reasonable person would have known. To determine whether an officer is
 21 entitled to qualified immunity, the Court asks, in the order it chooses, (1) whether the
 22 alleged misconduct violated a constitutional right and (2) whether the right was clearly
 23 established at the time of the alleged misconduct. When this test is properly applied,
 24 it protects all but the plainly incompetent or those who knowingly violate the law.

25 *Hernandez*, 897 F.3d at 1132 (internal citations, quotations, ellipses, and brackets omitted). To
 26 find a clearly established right, there does not need be a case with “materially similar facts”—
 27 instead, the “preexisting law” must have “provided the defendants with ‘fair warning’ that their
 28 conduct was unlawful.” *Kennedy*, 439 F.3d at 1065 (9th Cir. 2006).

1 Mrs. Maki alleges that Ms. Stone violated her Section 1983 rights over three days in
 2 September 2017. Ms. Stone knew that GC was uncontrollably and unpredictably violent. And
 3 she knew that he would likely attack Mrs. Maki if placed alone in a room with her. Despite this,
 4 she ordered Mrs. Maki to isolate alone in a room with known violent person and then
 5 abandoned Mrs. Maki despite a rule requiring Ms. Stone to constantly monitor her safety. This
 6 violation was compounded by Ms. Stone using a firehose to lock the classroom door with Mrs.
 7 Maki inside, even though she had admitted it was unsafe.

8 Ninth Circuit case law, including *Grubbs I*, *Pauluk*, *Kennedy*, and *Patel*, (*supra*) show
 9 that Ms. Stone violated a constitutional right that was clearly established in 2017:

- 11 • Under *Grubbs I*, it is clearly established law that a supervisor cannot order an
 12 employee to work alone and unsupervised with a known violent person who is likely
 13 to attack the employee if the employer knows the employee likely cannot protect
 14 themselves. See 974 F.2d at 121-22 (1992).
- 15 • Under *Pauluk*, it is clearly established law that a supervisor cannot order a subordinate
 16 to work in close proximity to a known dangerous condition that the supervisor knows
 17 the employee is unable to protect themselves from. See 836 F.3d at 1125 (2016).
- 18 • Under *Patel* and *Kennedy*, it is clearly established law that an educator cannot violate a
 19 promise to supervise another's safety in the face of a known and immediate risk. *Patel*,
 20 648 F.3d at 975-76 (2011); *Kennedy*, 439 F.3d at 1057-58, 64-65 (2006).

21 Any of these cases, standing alone, show that Ms. Stone violated clearly established
 22 constitutional rights. When viewed jointly, they buttress the conclusion that Ms. Stone had
 23 "fair warning" her conduct was unlawful.

24 VI. OTHER ISSUES

25 A. The Court should take judicial notice of Washington's Core Retention Policies.

26 The Court may "take judicial notice at any stage of the proceeding." Fed. R. Evid. 201(d).
 27 Courts may take judicial notice of "a fact that is not subject to reasonable dispute because it ...
 can be accurately and readily determined from sources whose accuracy cannot reasonably be

1 questioned." Fed. R. Evid. 201(b)(2). "Under Rule 201, the court can take judicial notice of
 2 '[p]ublic records and government documents available from reliable sources on the Internet,'
 3 such as websites run by governmental agencies." *U.S., ex rel. Modglin v. DJO Glob. Inc.*, 114 F.
 4 Supp. 3d 993, 1008 (C.D. Cal. 2015); see, e.g., *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992,
 5 998 (9th Cir. 2010) (taking judicial notice of the information on the websites of two school
 6 districts because they were governmental agencies). When a fact is noticed, the court must
 7 instruct the jury to accept the noticed fact as conclusive. Fed. R. Evid. 201(f).

8
 9 Mrs. Maki's position is that public records available on the website of the Office of the
 10 Secretary of State of Washington required BSD to preserve video from September 26, 27, and
 11 28. Mrs. Maki does not request the Court to take judicial notice of the significance of these
 12 documents or their contents. It only requests that the Court take judicial notice of the
 13 authenticity of these public records.

14 Here, the Office of the Secretary of State of Washington maintains a website regarding
 15 retention schedules for state public agencies.³ Within that website, it maintains the Local
 16 Government Common Records Retention Schedule ("CORE") - Version 4.1.⁴ The document
 17 contained at that website sets forth the retention schedule that applies to "all local government
 18 agencies," as "approved by the Local Records Committee in accordance with RCW 40.14.070."
 19 The retention schedule requires that agencies retain specified records, including security
 20 footage, for the "minimum retention period as specified in this schedule." That document also
 21 enumerates all revisions to it since 2008. Mrs. Maki requests that the Court take judicial notice
 22 of the public record contained at the following link and issue an appropriate instruction:

23
 24
 25
 26 ³(available at:
<https://www.sos.wa.gov/archives/recordsmanagement/usingthelocalgovernmentcommonrecordsretentionschedulecore.aspx>) (last accessed 6/28/21)

27 ⁴(available at: [https://www.sos.wa.gov/_assets/archives/recordsmanagement/local-government-common-records-retention-schedule-\(core\)-v.4.1-\(august-2020\).pdf](https://www.sos.wa.gov/_assets/archives/recordsmanagement/local-government-common-records-retention-schedule-(core)-v.4.1-(august-2020).pdf)) (last accessed 6/28/21).

- [https://www.sos.wa.gov/_assets/archives/recordsmanagement/local-government-common-records-retention-schedule-\(core\)-v.4.1-\(august-2020\).pdf](https://www.sos.wa.gov/_assets/archives/recordsmanagement/local-government-common-records-retention-schedule-(core)-v.4.1-(august-2020).pdf)

The website for the Office of the Secretary of State of Washington also lists on its site a retention schedule that applies to Public Schools (K-12) and Educational Service Districts.⁵ That public record provides that it is to be “used in conjunction with” the CORE retention policy. That document also enumerates all revisions to it since 1976. Accordingly, Mrs. Maki requests that the Court take judicial notice of the public record contained at the following link and issue an appropriate instruction:

- [https://www.sos.wa.gov/_assets/office/public-schools-\(k-12\)-records-retention-schedule-v.8.4-\(april-2021\).pdf](https://www.sos.wa.gov/_assets/office/public-schools-(k-12)-records-retention-schedule-v.8.4-(april-2021).pdf)

B. At the close of evidence, the Court should issue an adverse inference instruction.

Plaintiff previously brought a spoliation motion due to BSD’s apparent destruction of the security footage outside Mrs. Maki’s classroom. Dkt. 36. Because the Court found there were issues of fact regarding spoliation, it declined to issue an instruction at that time. But cautioned that it might do so or issue other sanctions at trial. Dkt. 49. If Plaintiff establishes spoliation at trial, the Court should issue an appropriate spoliation instruction, to be submitted at that time.

C. The Court should allow Plaintiff’s counsel to ask defense witnesses Susan Stone, Kimberly Shipp, Garth Steedman, Denise Kennedy, and Linda-Sullivan Dudzic leading questions and prevent defense counsel from leading its own friendly witnesses called in the Plaintiff’s case in chief.

Plaintiffs in employment cases like this one must often call adverse witnesses in their case in chief. Under Fed. R. Evid 611(c), the Court should allow leading questions “when a party

⁵ (available at: [https://www.sos.wa.gov/_assets/archives/recordsmanagement/local-government-common-records-retention-schedule-\(core\)-v.4.1-\(august-2020\).pdf](https://www.sos.wa.gov/_assets/archives/recordsmanagement/local-government-common-records-retention-schedule-(core)-v.4.1-(august-2020).pdf))(last accessed 6/28/21).

1 calls a hostile witness, an adverse party, or a witness identified with an adverse party." An
 2 opposing party's employee or an employee at the time of the tort is generally considered to
 3 be "identified" with an adverse party. See *Chonich v. Wayne County Community College*, 874
 4 F.2d 359, 368 (6th Cir. 1989) (allowing leading questions on direct examinations of community
 5 college's former president and personnel director).⁶

6 The ancillary rule also must apply. "A party cannot ask his own witness leading
 7 questions." Notes of Advisory Committee on Proposed Rules, FRE 611. Just as a party may not
 8 vouch for his own witnesses, FRE 607, a party may not lead his witness after being called in the
 9 opponent's case in chief because such "cross-examination is in form only and not in fact, as for
 10 example the 'cross-examination' of a party by his own counsel after being called by the
 11 opponent (savoring more of re-direct)..." *Id.*

12 The witnesses listed below should be treated as adverse when called in Mrs. Maki's case
 13 in chief and Defendants must not lead these witnesses:

- 14 • Defendant Susan Stone. (Named Defendant).
- 15 • Former Defendant Linda Sullivan-Dudzic, whom BSD employs as a District
 16 Administrator in the position of Director of Special Programs & Alternative
 17 Education.⁷ Ms. Sullivan-Dudzic was a named defendant until the parties settled
 18 her claims in June 2021. And Plaintiff alleges that she ratified Ms. Stone's section
 19 1983 violations.

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⁶ *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1478 (11th Cir. 1984) (nurse employed by defendant at the time of the tort is "identified"); *Walker v. Target Corp.*, 2:16-CV-42-KS-MTP, 2017 WL 2987282, at *5 (S.D. Miss. 2017) (finding that "witnesses who were employees or agents of a defendant at the time of the alleged tort are identified with a party adverse to the plaintiff"). *Fehr v. SUS-Q Cyber Charter Sch.*, No. 4:13-cv-01871, 2015 WL 6166627, at *3 (M.D. Pa. 2015) ("The term 'witness identified with an adverse party' is intended to apply broadly to an identification based upon employment by the party or by virtue of a demonstrated connection to an opposing party.").

⁷ (available at <https://www.bremertonschools.org/Page/7733>) (last accessed 6/28/21) (showing Ms. Sullivan-Dudzic as an employee of BSD as of 6/28/21).

- Garth Steedman, whom BSD employs as a District Administrator in the position of Assistant Superintendent. Dkt. 96. Mr. Steedman is also the person who allegedly failed to preserve security footage.
- Denise Kennedy, whom BSD employed as a District Administrator in the position of BSD's long-time HR Director, including at the time of the events in this case. See Dkt. 96. She is cooperating with defense counsel. See, e.g., Dkt. 129 (declaration of Denise Kennedy). On the other hand, she has failed to return any of Plaintiff's counsel's voicemail messages or calls. When she did answer one of counsel's calls, she terminated the call after approximately 30 seconds and asked not to be called again. Indeed, she has described counsel's attempts to speak to her as "unwelcome." *Id.* And she is also the person who allegedly "misfiled" documents that Plaintiff believes may be explosive to her case. See Dkt. 122 (motion for relief and sanctions).
- Kimberly Shipp, whom BSD employed as a District Administrator in the position of Assistant Director of Special Services during the events relevant to this case. She initially agreed to speak with Plaintiff's counsel. But during that call, she omitted mention of her text suggesting that Ms. LaLanne is a repeated rulebreaker. See *id.* And, since then she has communicated, through defense counsel, that Plaintiff's counsel should not contact her.

Each of the above witnesses is a party opponent, speaking agent, or known to be hostile to Mrs. Maki's case. The Court's advanced ruling will streamline the presentation of evidence during trial.

V. CONCLUSION

Wendy Maki values the opportunity to appear before the Court.

RESPECTFULLY SUBMITTED this 28th day of June 2021.

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CERTIFICATE OF SERVICE

I, Dan Gallagher certify and state as follows:

1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Gallagher Law Office, whose address is 10611 Battle Point Drive NE, Bainbridge Island, Washington 98110.

2. I caused the foregoing document to be served upon counsel of record at the address and in the manner described below, on June 28, 2021.

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I hereby declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED on this 28th day of June, 2021.

/s/ Dan Gallagher